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IN THE

Supreme Court of the United States

OCTOBER TERM 1947

No. 485

GEORGE CORNELIUS MOORE and LESTER HAUGHTON,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

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Preliminary Statement

The petitioners were convicted of the crime of Murder in the First Degree, in the County Court, held in and for the County of Bronx, State of New York, and were sentenced to death on April 14, 1947.

Upon appeal to the Court of Appeals of the State of New York, the judgment of conviction was unanimously affirmed, as to each petitioner (297 N. Y. 734).

A *writ of certiorari* was granted by this Court, on December 22, 1947. This Court also ordered the execution of the sentence of death imposed on the petitioners stayed, pending the final disposition of the case by this Court.

The petitioners herein were charged with the crime of Murder in the First Degree in that, while acting in concert with each other and while engaged in the commission of an attempted robbery, they shot and killed one James M. Burke, a detective of the Police Force of the City of New York.

The evidence overwhelmingly established their guilt.

The respondent begs leave to refer this Court to the statement of facts set forth in the respondent's brief, in opposition to the petition for the *writ of certiorari* (pp. 2-5), and to the record on appeal herein.

Opinions of the State Courts

No opinion was rendered by the Trial Court, or by the Court of Appeals of the State of New York.

Proceedings in the Trial Court

On February 11, 1947, the Grand Jury of Bronx County, State of New York, filed an indictment against the petitioners, Moore and Haughton, for the crime of Murder in the First Degree.

Thereafter, Counsel was duly assigned, to each of the petitioners.

On February 19, 1947, each of the petitioners pleaded not guilty to the said indictment.

Thereafter, a motion was made, by the People, in the County Court, Bronx County, for a special jury, pursuant to the provisions of Section 749-aa of the Judiciary Law of the State of New York, to try the issues.[1]

This motion was opposed by Counsel for each of the petitioners.

The motion was granted on February 26, 1947, by the Hon. Harry Stackell, one of the Judges of the County Court of Bronx County, and it was ordered that a panel of 150 special jurors be drawn on the 3rd day of March, 1947.

---

[1] The Court of Appeals of the State of New York in the case of *People* v. *Hall*, 169 N. Y. 184, at page 197, held that the simple allegation that the indictment was for the crime of Murder in the First Degree was sufficient to justify the granting of such an application.

Such drawing was held and was supervised, as required by law, by a Justice of the Supreme Court of the State of New York.

Each of the petitioners was represented by Counsel at such drawing, and raised no objection, whatsoever, to the method of drawing.

On March 20, 1947, when the case was called for trial, before Hon. James M. Barrett, one of the County Judges of the County Court of Bronx County, each of the petitioners served a written challenge to the panel of jurors, upon the following grounds:

1. That Section 749-aa of the Judiciary Law of the State of New York is in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States.

2. That qualified Negro jurors were improperly excluded from the list of special jurors, from which said jury panel was drawn.

3. That qualified women jurors were improperly excluded from the list of special jurors, from which said jury panel was drawn.

The challenge came on to be heard, and the minutes of this hearing can be found at page 36 to 48 inclusive of the record on appeal.

At the conclusion of the hearing, the challenge was disallowed, to which ruling the petitioners duly excepted.

Upon the appeal to the Court of Appeals, the petitioners did not, and they do not now, urge their third ground of challenge (alleged improper exclusion of women jurors).

After the challenge was disallowed, a jury was duly selected, and the petitioners tried on the indictment aforesaid. The jury returned a verdict of guilty of the crime of Murder in the First Degree, as to each petitioner.

The Questions Presented

The petitioners now urge that "the trial court erred in denying petitioners' challenge to the special jury panel", for the following reasons:

1. That Section 749-aa of the Judiciary Law of the State of New York is unconstitutional, and that the trial of the petitioners by a special jury rather than by a general jury denied to the petitioners the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

2. That "the statute set forth no standard to guide those charged with the selection of the special jurors and therefore enabled these officials in Bronx County to use the same list of approximately 800 special jurors in a County of 1,489,000 population, thereby denying to the petitioners the equal protection of the laws guaranteed to them by the Federal constitution."

3. That qualified Negroes were systematically, intentionally and deliberately excluded from the panel of jurors from which a trial jury was selected.

Outline of Argument

Our argument will be presented under the following headings:

1. The trial and conviction of the petitioners for the commission of the crime of Murder in the First Degree by a special jury, pursuant to Section 749-aa of the Judiciary Law of the State of New York, did not deny to the petitioners their rights under the Fourteenth Amendment to the Constitution of the United States.

2. The petitioners are in error in asserting that the same list of approximately 800 special jurors has been used since 1938.

3. There was no systematic, intentional and deliberate exclusion of Negroes from the panel of jurors from which the jury was selected in the instant case.

POINT I

The trial and conviction of the petitioners for the commission of the crime of Murder in the First Degree, by a special jury, pursuant to Section 749-aa of the Judiciary Law of the State of New York, did not deny to the petitioners their rights under the Fourteenth Amendment of the Constitution of the United States.

The petitioners, under their Point I, contend that Section 749-aa of the Judiciary Law of the State of New York is unconstitutional, in that it violates the Fourteenth Amendment of the Constitution of the United States.

It is their contention that special juries are convicting juries, and that their trial by a special jury denied them the equal protection of the laws, guaranteed them by the Fourteenth Amendment.

The contention of the petitioners that special juries are convicting juries was not even remotely suggested to the Trial Court, on the hearing of the challenge.

The Hearing on the Challenge Examined

On March 20, 1947, the petitioners were called to trial before Hon. James M. Barrett, one of the County Judges of Bronx County.

A panel of 150 special jurors, drawn on March 3, 1947, were present in court.

The record on appeal shows the following:

"APPEARANCES:

For the People:
SAMUEL J. FOLEY, Esq., District Attorney, Bronx County, and NICHOLAS F. DELAGI, Esq., Assistant District Attorney.

For Defendant Moore:
JOHN F. WILKINSON, Esq., and ISIDORE EHRMAN, Esq.

For Defendant Haughton:
I. SAUL FLEISCHMAN, Esq., and HENRY F. McDONOUGH, Esq.

* * * * * * *

The Court: There has just been submitted to me within the past 10 or 15 minutes a challenge on behalf of the defendant George Cornelius Moore and the defendant Lester Haughton as to the sufficiency of the panel that has been called to try this case. That is under Section 363 of the Code of Criminal Procedure. (A copy of this challenge was not served on the District Attorney until after the Court received the challenge this morning.)" (R. 36, 37).

Issue having been joined, the Court stated as follows:

"The Court: We will proceed to try the issue. All jurors are excused until tomorrow morning at ten minutes to ten.

All right, gentlemen, it is up to you to proceed" (R. 38).

The record on appeal, at pages 38 and 39, shows that the Court aided counsel for petitioners, in obtaining the witnesses they required and the evidence which they sought, in order to establish their grounds of challenge.

After a short recess, the Court made the following inquiries:

"The Court: Are you ready, gentlemen?
Mr. Wilkinson: Defendant Moore is ready.
Mr. Fleischman: Defendant Haughton is ready.

The Court: You made certain requests of me before. Have you had ample opportunity to look at the records you have asked to be produced?

Mr. Wilkinson: Yes, sir.

The Court: Are both sides ready to proceed?

Mr. Wilkinson: Yes, sir.

The Court: I understand the inquiry now is to be directed to the intentional elimination or disqualification of women and Negroes on the special jury panel.

Mr. Wilkinson: That is correct.

The Court: All right; proceed.

Mr. Fleischman: Intentional or improper elimination.

The Court: Swear the County Clerk" (R. 39, 40).

The petitioners then called Michael B. McHugh, County Clerk of Bronx County, and one William F. Fisher, employed in the County Clerk's Office, Division of Jurors.

Both these witnesses were interrogated by the petitioners and the respondent.

The record shows that the petitioners were at no time restricted or limited in their examination of these witnesses, nor were they prevented from calling any other witnesses or from producing any other evidence.

The record shows the following:

"Mr. Wilkinson: No further questions.

Mr. Fleischman: That's all, your Honor.

(Witness excused.)

Mr. Wilkinson: That's all the evidence that the defendant Moore is submitting on the challenge.

Mr. Fleischman: That's all the defendant Lester Haughton is submitting on the challenge, your Honor.

Mr. Wilkinson: On the basis of the foregoing evidence the defendant Moore moves to sustain the challenge and to dismiss the panel.

Mr. Fleischman: The same thing for Lester Haughton.

The Court: Motion denied. Challenge disallowed.

Mr. Wilkinson: I take exception to the Court's finding.

Mr. Fleischman: I take exception in behalf of Lester Haughton.

The Court: Is that all, gentlemen? You have had everything you want now?

Mr. Fleischman: That's all.

Mr. Wilkinson: That's all, sir.

The Court: All right. We will proceed tomorrow morning at ten o'clock. The case is adjourned until ten o'clock tomorrow morning" (R. 48).

The record then shows the following to have taken place the next morning:

"The Court: Proceed. You are allowed 30 peremptory challenges. I will pick two alternate jurors in this case.

Mr. Fleischman: At this time I would like the Court to take judicial notice of the fact that there are no colored jurors on the Special Panel of 150 jurors.

The Court: This Court will take notice of it. It is apparent that there are no negro jurors present at this time.

Mr. Wilkinson: I make the same request on behalf of the defendant, Moore.

The Court: Proceed" (R. 49).

Notwithstanding this state of the record petitioners now claim the Court erred in disallowing their challenge to the special jury panel.

It will be observed from the record of the trial of the challenge, that the inquiry was directed solely "to the intentional elimination or disqualification of women and negroes on the special jury panel" (R. 39).

The evidence adduced at the hearing of the challenge on the alleged intentional elimination or disqualification of negroes will be discussed under Point III of this brief.

A. Section 749-aa is constitutional.

The petitioners, as one of the grounds of their challenge, urged, before the Trial Court, that Section 749-aa of the Judiciary Law of the State of New York (Special

Jury Law) was unconstitutional, in that it violated the Fourteenth Amendment of the United States Constitution.

This ground of challenge was specified in their written challenge. They offered no evidence in support of this ground of challenge. They did not present to the Trial Court, on the hearing of the challenge, the matters now urged under their Point I.

However, the respondent begs leave to reply to the contention of the petitioners.

The Special Jury Statute, enacted in 1896, and re-enacted in its present form in 1901, has, at all times, when challenged as to its constitutionality, been held to be a proper legislative enactment (*People* v. *Dunn* (1899), 157 N. Y. 528; *People* v. *Meyer* (1900), 162 N. Y. 357; *People* v. *Hall* (1901), 169 N. Y. 184 (Cf. *Hall* v. *Johnson,* 186 U. S. 480); *People* v. *Conklin* (1903), 175 N. Y. 333; *People* v. *Wolter* (1911), 203 N. Y. 484; *People* v. *Buchalter* (1942), 289 N. Y. 181, aff'd 319 U. S. 427).

In view of these decisions, upholding the constitutionality of the Special Jury Law, the Trial Court properly disallowed the petitioners' challenge predicated upon the alleged ground of unconstitutionality.

Since these decisions, this Court, in the recent case of *Fay* v. *New York,* decided June 23, 1947 (U. S. Supreme Court, Law-ed. Advance Opinions 1946-1947, Vol. 91—No. 17), rehearing denied October 13, 1947, had the question of the constitutionality of Section 749-aa of the Judiciary Law of the State of New York before it.

This Court held the statute to be constitutional.

In the prevailing opinion, Mr. Justice Jackson, at page 1523 said:

> "We fail to perceive on its face any constitutional offense in the statutory standards prescribed for the special panel. The Act does not exclude, or authorize the clerk to exclude, any person or class because of race, creed, color or occupation. It imposes no qualification of an economic nature beyond that imposed by

the concededly valid general panel statute. Each of the grounds of elimination is reasonably and closely related to the juror's suitability for the kind of service the special panel requires or to his fitness to judge the kind of cases for which it is most frequently utilized. Not all of the grounds of elimination would appear relevant to the issues of the present case. But we know of no right of defendants to have a specially constituted panel which would include all persons who might be fitted to hear their particular and unique case. This panel is for service in a wide variety of cases and its eliminations must be judged in that light. We cannot overlook that one of the features which has tended to discredit jury trials is interminable examination and rejection of prospective jurors. In a metropolis with notoriously congested court calendars we cannot find it constitutionally forbidden to set up administrative procedures in advance of trial to eliminate from the panel those who, in a large proportion of cases, would be rejected by the court after its time had been taken in examination to ascertain the disqualifications. Many of the standards of elimination which the clerk is directed to apply in choice of the panel are those the court would have to apply to excuse a juror on challenge for cause."

B. Special juries are not convicting juries.

The petitioners, as was contended in *Fay* v. *New York, supra,* contend that special juries are convicting juries, and refer to the fourth annual report of the Judicial Council of the State of New York (pp. 46-48) in support of that contention.

Counsel for the petitioners further point to the result of their investigation of the records of convictions, in the County Court of Bronx County, to substantiate that claim.

They assert that from July 1, 1937, to June 30, 1946, there were 79% of convictions by special juries, as compared with 57% of convictions by ordinary juries; that of the 19 cases tried by special juries, during that period, there were 15 convictions and 4 acquittals.

Accepting the figures submitted by the petitioners, the respondent begs leave to point out that all of the cases in which special juries were used in Bronx County, from July 1, 1937, to June 30, 1946, were capital cases, with the exception of two. One of those two cases involved a manslaughter, arising out of an abortion; and the other, an involved case of criminally receiving stolen property, which took about three weeks to try.

In five of the above capital cases, in which verdicts of guilty were returned, the jury convicted of a lesser degree than that charged in the indictment.

So that, in nine of the nineteen cases tried, by special juries in Bronx County, the defendants were either acquitted or found guilty of lesser degrees of crime than that charged.

Surely, such a record does not support the contention of the petitioners that special juries are convicting juries.

The petitioners rely, heavily, on the annual reports of the Judicial Council of the State of New York in support of their contention.

Mr. Justice Jackson, in his opinion, in *Fay* v. *New York, supra,* at page 1528, with reference to the reports of the Judicial Council, said as follows:

> "While the Judicial Council has pointed out and investigated the different conviction ratios, it has at no time suggested that the special jury has been inclined to convict except where conviction was warranted. New York extends an appeal on law and fact as matter of right. If there were a tendency to convict improperly, the Judicial Council, which includes the Chief Judge of the Court of Appeals and the Presiding Justice of the Appellate Division, which courts review these cases, would know it. Despite the Council's desire to abolish this jury, no such reasons were ever assigned. No statistics are produced to show that special juries have been more often reversed on the facts than ordinary ones. Of course, it would be impossible for us to say even were we to examine the cases in detail whether the difference in percentage of convictions indicated a too great readiness to convict on the part of special juries

or to a too great readiness to acquit on the part of ordinary juries, or whether the disparity reflected a difference between the ordinary case and those selected for special jury trial, rather than a reflection of an attitude on the part of either panel. It may result from the greater attention and better counsel which the prosecution gives to these important cases."

The respondent respectfully submits that statistics have little value in determining what the attitude of jurors has been in the past.

Ever so many factors determine whether a juror in a given case will return a verdict of guilty. Some of those factors are:

1. Sympathy plays a great part in the trial of a criminal case. Experience has shown that where the crime is of a serious nature, or is affected with a great public interest, sympathy is less likely to play a part in the jury's consideration of the case. It is that type of case which is generally tried by a special jury in Bronx County.

The respondent has examined the records of the office of the District Attorney of Bronx County, for the purpose of pointing out the type of cases tried by general juries, in which there were acquittals, and in which sympathy for the defendants, because of the nature of the charge, undoubtedly, played a great part in the verdicts.

Between July 1, 1937, and June 30, 1946, there were 208 acquittals by general juries.

A table has been prepared to show the type of cases in which there were acquittals. This table may be found in Appendix A.

It will be seen, from this table, that 12 of the cases were misdemeanors, usually tried, in the City of New York, in the Court of Special Sessions, without a jury; and only triable in the County Court with a jury, after indictment by a Grand Jury, upon an order of the County Court certifying that, because a property right is involved, it is reasonable that such charge should be prosecuted by indictment (Sec. 31, New York City Criminal Courts Act).

The type of cases on this list, when contrasted with the type of cases tried by special juries, accounts for the disparity between the number of acquittals by general juries and the number of acquittals by special juries.

2. Capital cases, such as are tried, in the main, by special juries, in Bronx County, receive greater attention from the police, in their search for evidence, and more thorough preparation on the part of the prosecution.

It is common knowledge that only the ablest and most experienced prosecutors are assigned to the trial of capital cases. Thus, the case at bar was tried by the District Attorney himself who, in the past ten years, has tried none but capital cases.

3. In the type of cases tried by special juries, material witnesses are taken into custody and committed, so as to be available at the trial. Thus, in the case at bar, four important witnesses were committed, and testified upon the trial.

This practice results in material evidence being available, and lessens the opportunity, of those interested in bringing about an acquittal of the defendant, to tamper with such witnesses.

In the trial of ordinary cases, with general juries, this practice is rarely resorted to, because it would involve the commitment of a multitude of witnesses.

4. In 1930 the District Attorney of Bronx County established a system, which has been in continuous use since then. Experience has shown that this system accounts for the greater percentage of convictions in capital cases (the type of cases tried by special juries, almost exclusively, in Bronx County).

That system operates as follows:

An Assistant District Attorney is assigned, for a stated period, to what is known as a Felony and Homicide Assign-

ment; and is on duty for 24 hours each day, during such stated period.

In the case of a homicide, the Assistant District Attorney, who has this assignment, is notified by the Police Department, immediately upon the discovery of a homicide.

He is required to go to the scene of the crime, with a stenographer, and assume charge of the investigation.

Invariably, he finds, at the scene, members of the Police Department, the Medical Examiner assigned to Bronx County, technical experts of the Police Department, together with detectives of a specially formed squad of the Police Department, known as the Homicide Squad.

Whether there is an immediate arrest or not, all available witnesses are questioned, and their statements stenographically recorded.

Any and all evidence is carefully preserved, and every avenue of investigation is followed, under the supervision of the District Attorney.

This practice, as the record on appeal herein will attest, was followed in the case at bar.

The record, herein, shows how the District Attorney and the Police cooperated, in gathering and preserving all the available evidence.

In non-capital cases, with rare exceptions, the Assistant District Attorney, on the Felony and Homicide Assignment, is notified by the Police, for the first time, when an arrest has been made, and not as soon as the crime is discovered, as in homicide cases.

The Assistant then proceeds to the Police Precinct, where the defendant is in custody, and examines the defendant, as well as available witnesses.

Section 332 of the Code of Criminal Procedure of the State of New York provides, in part, that "a conviction shall not be had upon a plea of guilty, where the crime charged is or may be punishable by death".

In view of that statute, the Court may not accept a plea of guilty to the crime of Murder in the 1st Degree, since such crime is punishable by death.

Accordingly, every capital case, in which the District Attorney seeks to obtain a conviction of Murder in the 1st Degree, must be tried; and the defendant, even if he desires to plead guilty to Murder in the 1st Degree, is unable to do so.

However, in non-capital cases, a defendant, so desiring, may plead guilty to the indictment. This obviates the necessity of a trial.

A reference to the 1947 report of the Judicial Council of the State of New York (13th Annual Report) shows that from July 1, 1945, through June 30, 1946, out of a total of 532 convictions, 200 were convicted, as charged, by pleas of guilty, and only 17 were convicted by verdict of the jury; and that 308 were convicted by pleas of guilty to lesser degrees of the offense charged, and only 7 by verdict of the jury.

While the reports for the years prior to 1947 differ in the totals, an examination of such reports will bear out the statement of the respondent that a great number of the non-capital cases are disposed of by pleas of guilty, and that only a very small number are actually tried.

Thus, the practical result is that, in non-capital cases, defendants who know the strength of the People's case, or know that they have made confessions of their guilt to the District Attorney, in the presence of a stenographer, plead guilty, and a trial is, therefore, unnecessary.

Because of this right to interpose a plea of guilty, in non-capital cases, the cases in which no pleas of guilty are offered by defendants are cases, in most instances, where the defendants have made no confessions, or where the People's case is weak.

Accordingly, what remains to be tried of non-capital cases, are generally cases where, because of the weakness of the People's case, it is difficult to obtain a conviction.

This, we respectfully submit, also accounts for the disparity between the number of convictions by general juries and the number of convictions by special juries, trying capital cases, in the main, in Bronx County.

Since, for the most part, only capital cases have been tried by special juries in Bronx County, while ordinary "run-of-the-mill" cases have been tried by general juries, the difference in the percentage of convictions cannot be attributed to a "too great readiness to convict on the part of special juries or to a too great readiness to acquit on the part of ordinary juries".

The disparity in the percentage of convictions, it is respectfully submitted, reflects a difference between the ordinary case and the important case selected for special jury trial.

Each case, it is submitted, stands upon its own facts.

Notwithstanding the greater attention and more thorough preparation given to the trial of capital cases, tried by special juries, special juries acquit, or convict of a lesser degree of crime, where the evidence warrants it.

Thus, in Bronx County, from July 1, 1937 to June 30, 1946, special juries acquitted in four out of nineteen cases tried; in five cases they convicted of a lesser degree than that charged in the indictment; and in one case convicted of Murder in the First Degree, with a recommendation, by the jury, of life imprisonment.

It is respectfully submitted that the contention of the petitioners that special juries are convicting juries is without merit.

C. The petitioners' argument that there is no need for special juries is an argument addressed to legislative policy and not to constitutionality.

The petitioners, under their Point I, also urge "that there are no special qualifications required by special jurors as distinguished from general jurors". They assert that general jurors who are not opposed to capital punishment are qualified to serve as special jurors.

The evidence introduced on the hearing of the challenge shows that a special juror, in Bronx County, in addition to possessing the qualifications required of a general juror, must sign and swear to a separate application (Defend-

ants' Exhibit 1, R. 894), in which he makes the following statements:

> "I have not been convicted of a criminal offense or found guilty of fraud or misconduct by the judgment of any civil court.
>
> I do not possess conscientious opinions with regard to the death penalty which would preclude me from finding a defendant guilty, if the crime charged be punishable with death.
>
> I do not doubt my ability to lay aside opinions or impressions formed from NEWSPAPER READING OR HEARSAY, and to render an impartial verdict upon evidence, uninfluenced by any such opinions or impressions.
>
> I do not possess such opinions as would prevent my finding a verdict of guilty in any case upon CIRCUMSTANTIAL EVIDENCE.
>
> I have not such a prejudice against any LAW OF THE STATE as would preclude my finding a defendant guilty of violating such law.
>
> I have not such a prejudice against any particular DEFENSE to a criminal charge as would prevent my giving a fair and impartial trial upon the merits of such defense.
>
> I could in all cases give to a defendant, who fails to testify as a witness in his own behalf, the full benefit of the statutory provision that his neglect or REFUSAL TO SO TESTIFY as a witness in his own behalf does not create any presumption against him."

The information thus obtained from special jurors, concerning matters of vital importance both to the prosecution and to defendants, facilitates the selection of juries where special juries are employed.

This Court in *Fay* v. *New York, supra,* at pp. 1528, 1529, said:

> "The evidence in support of these objections may well, as the Judicial Council thought, warrant a political or social judgment that this special panel in 1945 was 'unnecessary and undesirable' and that the Legislature should abolish it. But it is quite another matter to say that this Federal Court has a mandate from

the Constitution to disable the special jury by setting aside its convictions. The great disparity between a legislative policy or a political judgment on the one hand and a constitutional or legal judgment on the other, finds striking illustration in the position taken by the highest judicial personages in New York State who joined in the recommendation to abolish the special jury.

Two members of the Council who joined in proposing Legislation to abolish the dual system sat in this case and abstained from putting their legislative recommendation into a court decision—they sustained as constitutional the system they would abolish as matter of policy. Our function concerns only constitutionality and we turn to the bearing of federal constitutional provisions on the legal issues.

It is not easy, and it should not be easy, for defendants to have proceedings set aside and held for naught on constitutional grounds when they have accepted as satisfactory all of the individual jurors who sat in their case, * * *. This court has long dealt and must continue to deal with these controversies from State Courts with self-imposed restraints intended to protect itself and the state against irresponsible exercise of its unappealable power."

Reference is also made by the petitioners to the fact that no special jurors are employed in Richmond County, in the City of New York, in support of their contention that there is no need for special jurors.

According to the 1947 "World Almanac", the estimated population of Richmond County for 1947 was 186,000 as against 1,489,000 for the County of Bronx (p. 912).

It surely cannot be properly urged that the jury problems, and the problems arising in the administration of the criminal law in a county with a population of 186,000 are the same as those in a county with a population close to a million and a half (a population in excess of that found in any city of the United States with the exception of five cities).

POINT II

The petitioners are in error in asserting that the same list of approximately 800 special jurors has been used since 1938.

Under their Point II the petitioners, repeatedly, assert that "the District Attorney has for the past nine years prosecuted criminal cases by special jury before the same 800 special jurors".

This statement is without foundation.

The evidence adduced, at the hearing of the challenge, shows that, from time to time, there are "vacancies" in the special jury list, due to deaths and removals from the county (R. 42, 44).

"Vacancies" are also created by jurors reaching the age of 70, the retirement age, under the law.

The respondent has caused an investigation to be made, to determine the number of jurors stricken from the special jury list of 800, and those added, for the period from 1938 to 1946, the period referred to by the petitioners.

Thus, the following table shows the number of special jurors added to, and stricken from, the special jury list, for the said nine years:

Year	*Added*	*Stricken*
1938	41	98
1939	53	52
1940	1	69
1941	222	133
1942	43	88
1943	214	160
1944	95	117
1945	81	77
1946	45	63
	795	857

The petitioners also make the statement that the fact that the "self-same" special jurors of 800 have been used "year after year" "accounts for the high percentage of convictions by special jurors as compared to ordinary juries".

In view of this statement, the respondent has caused an investigation to be made of the trial jury in the case at bar.

That investigation revealed the following:

Of the twelve jurors who sat in the case at bar, and returned a verdict of guilty against the petitioners, ten had never, before, sat as special jurors; the remaining two sat as special jurors, in one case each, during the trial of which cases pleas of guilty to lesser degrees of the crime charged, were interposed, by the defendants on trial, and accepted by the Court, so that these two jurors were never called upon to render a verdict.

It is therefore respectfully submitted that petitioners' statement "that the 800 special jurors have been the same for the past nine years", and that that accounts for the high percentage of convictions; is contrary to the facts.

The petitioners refer to the testimony of William F. Fisher, in which he denies that the County Clerk keeps a record of convictions by special jurors. Despite this positive denial, which stands uncontradicted, they ask that this testimony of Fisher be "discounted".

In the case at bar, the records show that the petitioners raised no objection to the manner of drawing, which drawing was supervised by a Justice of the Supreme Court, as required by law.

At no time, on the trial of the challenge, was it urged or even suggested that there was any impropriety on the part of the County Clerk in the method of drawing the jury, or that he entertained any prejudice which precluded him for drawing an unbiased jury.

There is not the slightest evidence, in the case at bar, to indicate that the County Clerk had any motive, whatsoever, for selecting "convicting special jurors".

As stated in 50 *C. J. S.*, p. 1026, Section 265:

> "On a challenge to the array or motion to quash the venire, the burden is on the party presenting the challenge or motion to prove the facts alleged therein. It will be presumed, in the absence of evidence to the contrary, that the officers charged with the duty of selecting, drawing and summoning the jury have acted faithfully and according to law, and the burden of showing the contrary is on the challenging party. • • •"

POINT III

There was no systematic, intentional and deliberate exclusion of negroes from the panel of jurors from which the jury was selected in the instant case.

> "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and in nearly all cases it has been shown to have persisted over many years. Virginia v. Rives, 100 U. S. 313, 322, 323, 25 L. ed. 667, 670, 671; Martin v. Texas, 200 U. S. 316, 320, 321, 50 L. ed. 497, 498, 499, 26 S. Ct. 338; Thomas v. Texas, 212 U. S. 278, 282, 53 L. ed. 512, 513, 29 S. Ct. 393; Smith v. Texas, 311 U. S. 128, 85 L. ed. 84, 61 S. Ct. 164; Hill v. Texas, 316 U. S. 400, 86 L. ed. 1559, 62 S. Ct. 1159; Akins v. Texas, 325 U. S. 398, 89 L. ed. 1692, 65 S. Ct. 1276, supra. Also, when discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant. Tarrance v. Florida, 188 U. S. 519, 47 L. ed. 572, 23 S. Ct. 402; Martin v. Texas, 200 U. S. 316, 50 L. ed. 497, 26 S. Ct. 338; Norris v. Alabama, 294 U. S. 587, 79 L. ed. 1074, 55 S. Ct. 579; Snowden v. Hughes, 321 U. S. 1, 8, 9, 88 L. ed. 497, 502, 503, 64 S. Ct. 397; Akins v. Texas, 325 U. S. 398, 400, 89 L. ed. 1692, 1694, 65 S. Ct. 1276."

Fay v. *New York, supra,* 1530.

The evidence introduced by the petitioners to establish their ground of challenge that negroes were systematically, intentionally, and deliberately excluded from the panel of jurors, wholly fails to substantiate that claim.

The petitioners, upon the trial of the challenge, called one William F. Fischer, employed in the County Clerk's Office, Bronx, Division of Jurors Office, who supervised the compiling of the list of special jurors.

He testified that under the law he was required to prepare a list of 800 special jurors; that such list was made up from the list of regular jurors; that he could not tell, from the records, how many on the special jury list were negroes or whites, since no record was made as to color, race or creed, in the selection of special or regular jurors (R. 41-48).

He testified that, because of that fact, he was unable to state how many negroes were on the special jury list, but said that he was certain that there were some.

Thus, his testimony on that point was as follows:

"Q. Mr. Fischer, of your own knowledge, you cannot then definitely state whether or not there are any Negro jurors on the special panel? A. Well, we know there are.

Q. When you say you know there are, do you know that from your records? A. Yes, sir; from examining them personally.

Q. How many would you say there are on the special list? A. I couldn't even give you an estimate, because there are so many of them that come in. I couldn't tell you truthfully.

Q. You mean there are so many people that come into your office? A. No; colored people that we examine.

Q. And how many have you accepted? A. We couldn't tell you that. There is no way of telling.

Q. One, two, five, ten; can you give us an approximate idea? A. I couldn't tell you maybe two dozen; maybe three dozen.

Q. Maybe only five? A. Oh, no; that would be too small an amount. I should say from 1946 on I must have examined at least 500 myself.

Q. And how many of those 500 did you accept? A. That is, for regular jury work.

Q. I am concerned now, Mr. Fischer, with just the special list. A. Oh, I would say I examined maybe about a hundred, and of those maybe, well not to pin me down, maybe a dozen" (R. 44-45).

Fischer also testified that he was not aware of any deliberate intent to exclude negroes from service on special juries; that the drawing of the special jury panel for the instant case was supervised by a Justice of the Supreme Court; that the petitioners were represented by counsel at the drawing, and that no objection was raised to the method of drawing (R. 46).

The foregoing testimony of Fischer utterly fails to establish any systematic, purposeful and deliberate exclusion of negroes from the special jury list.

The uncontradicted testimony is that no person was excluded because of race, creed or color.

The petitioners urge, "That of 500 negro jurors examined for jury duty approximately twelve were selected as special jurors on a special jury panel of 783 or 784."

The petitioners are in error in stating that twelve special jurors were selected out of 500 negroes examined.

The evidence on this point, though not very clear, indicates that 500 negroes were examined "for regular jury work"; that 100 were examined for special jury service, and that of that number about twelve negroes were selected (R. 44-45).

In the recent case of *Patton* v. *State of Mississippi* (68 S. Ct. 184), decided by this Court on December 8, 1947, this Court reiterated the principle that it is only where there is a systematic, intentional and deliberate exclusion of negroes from jury duty that there can be said to be a denial of constitutional rights.

Thus, this Court, at page 185, said:

"Sixty seven years ago this court held that state exclusion of negroes from grand and petit juries solely

> because of their race denied negro defendants in criminal cases the equal protection of the laws required by the Fourteenth Amendment. Strauder v. State of West Virginia, 1880, 100 U. S. 303, 25 L. Ed. 664. A long and unbroken line of our decisions since then has reiterated that principle regardless of whether the discrimination was embodied in statute or was apparent from the administrative practices of state jury selection officials, and regardless of whether the system for depriving defendants of their rights was 'ingenious or ingenuous'.
>
> Whether there has been systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case. • • • "

The petitioners do not claim that discrimination against negroes is found in the statute involved herein. Nor do they claim that there is direct evidence of deliberate discrimination on the part of the officials charged with the drawing of special jurors.

However, they presume this from the fact that there were no negroes on the panel of 150 drawn for the case at bar, and from the fact that more negroes were not on the special jury list.

Notwithstanding the direct and positive testimony of the witness Fisher, which was uncontradicted, that there was no discrimination of any kind against negroes, and the fact that the testimony shows that there were in fact about two or three dozen negroes on the special jury list, the petitioners ask this Court to presume such discrimination.

As was said by this Court in *Tarrance* v. *Florida* (188 U. S. 519, at p. 520):

> "• • • But such an actual discrimination is not presumed. It must be proved or admitted. • • • "

In *Snowden* v. *Hughes* (321 U. S. 1, at pp. 8, 9) this Court said:

> "• • • But a discriminatory purpose is not presumed, Tarrance v. Florida, 188 U. S. 519, 520; there

must be a showing of 'clear and intentional discrimination,' Gundling v. Chicago, 177 U. S. 183, 186; see Ah Sin v. Wittman, 198 U. S. 500, 507-8; Bailey v. Alabama, 219 U. S. 219, 231. Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face. * * *. But a mere showing that negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race. Virginia v. Rives, 100 U. S. 313, 322-3; Martin v. Texas, 200 U. S. 316, 320-21; Thomas v. Texas, 212 U. S. 278, 282; cf. Williams v. Mississippi, 170 U. S. 213, 225."

In the case of *Akins* v. *Texas* (325 U. S. 398, pp. 400, 401), this Court said:

"The Fourteenth Amendment forbids any discrimination against a race in the selection of a grand jury. * * * The burden is, of course, upon the defendant to establish the discrimination. Tarrance v. Florida, 188 U. S. 519, 520; Martin v. Texas, 200 U. S. 316; Norris v. Alabama, 294 U. S. 587, 590. An allegation of discriminatory practices in selecting a grand jury panel challenges an essential element of proper judicial procedure—the requirement of fairness on the part of the judicial arm of government in dealing with persons charged with criminal offenses. It cannot lightly be concluded that officers of the courts disregard this accepted standard of justice."

There is nothing in the testimony of Fisher which can be said to suggest that he was prejudiced against negroes, and that they were discriminated against because of such prejudice.

On the contrary, Fisher was most emphatic in his testimony that no prejudice against negroes existed. Thus, his testimony is that "a juror is a juror, white or black, race or creed, man or woman" (R. 43).

The petitioners rely heavily upon the case of *Smith* v. *Texas* (311 U. S. 128). That case is clearly distinguishable from the case at bar.

It is a matter of common knowledge that the conditions which obtain in the States of Texas, Mississippi and other southern States are entirely different from those which obtain in the State of New York. The unhappy relations between the white and colored races existing in the southern States are not to be found in the State of New York.

The State of New York recognizes the equality of all men, regardless of race, creed or color. Whenever the State of New York has spoken officially, it was to uphold this principle of equality of all races.

In Appendix B, the respondent has listed a number of provisions in the Constitution of the State of New York, and in the statutes of the State, indicating, clearly, the policy of the State of New York with respect to discrimination on account of color, race, creed or national origin.

Negro Population in Bronx County

At the hearing of the challenge, the petitioners did not offer any evidence with respect to the population of Bronx County, white or colored. They now make reference to this matter, for the first time, and refer to statistics that were not before the Trial Court.

In view of that, the respondent begs leave to reply, in order to show the true situation.

The United States Census figures show the following:

POPULATION OF BRONX COUNTY, NEW YORK [2].

Year	*Total Population*	*White*	*Negro*	*Negro Proportion*
1920	732,016	726,990	5,026	.7%
1930	1,265,258	1,251,823	13,435	1.0%
1940	1,394,711	1,370,319	24,892	1.7%

[2] Total Census of Population for Year 1940, Vol. 2, Part 5, Page 163, Table D-35.

Thus, it will be seen that until April, 1940, when the official United States Census was taken, the negro population in Bronx County was very small.

There is no doubt but that the negro population of Bronx County has increased, since 1940. The extent of that increase is largely conjectural.

In Appendix D of the petitioners' brief there appears a copy of a letter, dated January 23, 1948, from one Bernard Lander, which purports to give an estimate of the negro population in Bronx County.

According to this estimate, the total negro population of Bronx County is 192,066.

Upon inquiry by the respondent, the said Bernard Lander advised the respondent as follows: "When I wrote of the most authoritative official City sources, I was referring to the estimate of New York City's negro population which I received from the Police Department."

The respondent made inquiry of the Police Commissioner of the City of New York with respect to this estimate.

On January 28, 1948, the respondent received a letter, dated January 28, 1948, from the Police Commissioner of the City of New York, a copy of which is set forth in Appendix C.

In that letter the Police Commissioner wrote the following:

> "As per attached copy of Letter, I have advised Mr. Bernard Lander, Associate Director, Mayor's Committee on Unity, that the figure of 192,066 originally given him was not solely for negroes but included all persons in Bronx County not of the white race and that a re-survey, verified by general information from various sources including the Urban League of Greater New York, indicates that the negro population of Bronx County is now between 65,000 and 70,000 persons."

The figures originally furnished Mr. Landers, on January 22, 1948, by the Acting Secretary to the Police Commis-

sioner, appeared under the following heading: "Approximate Colored Population", and not approximate negro population.

It is respectfully pointed out that the estimate of the negro population made by the Police Department, as appears in the letter of January 28, 1948, to the respondent from the Police Commissioner, was not the result of a census, but was a mere approximation or guess on the part of the Police Officials.

Annexed (Appendix D) is a letter from Mr. Landers, dated February 4, 1948, to I. Saul Fleischman, one of the attorneys herein, revising the estimate of the negro population.

The figures of 65,000 to 70,000 represent less than 5% of the total population of Bronx County, as of January, 1948.

There still remain many questions which cannot be answered. It is not known in what year the increase in population occurred; whether the negroes who moved into Bronx County remained there, or were migratory; the age, occupation, education, and property possessed by these people, who came to the Bronx since 1940, and their general eligibility and availability for jury service, are all matters of speculation.

Whether or Not There Was a Deliberate and Intentional Exclusion of Negroes Was a Question of Fact

The decision of the Trial Court, in disallowing the challenge, imports a finding, by that Court, that the evidence did not establish any deliberate and intentional exclusion of negroes.

That finding was unanimously affirmed by the Court of Appeals of the State of New York.

This Court has said that it will accord great respect to the conclusions of the state judiciary (*Akins* v. *Texas*, supra, at p. 402), and that it will accept the conclusion of the trier on disputed issues "unless it is so lacking in sup-

port in the evidence that to give it effect would work that fundamental unfairness which is at war with due process".

The record in the instant case not only shows that the petitioners failed to establish their claim that there was a systematic, intentional and deliberate exclusion of negroes from the special jury panel, but it affirmatively appears from the record that negroes, from time to time, were examined as to their qualifications for special jury service; and that a number of negroes were, in fact, selected for such service, and their names appeared on the special jury list, and were in the drum from which the jurors' names were selected.

The mere fact that there were no negroes on the panel of 150 jurors drawn in the instant case is no proof that there was discrimination against them.

> "Even in the Negro cases this Court has never undertaken to say that a want of proportionate representation of groups, which is not proved to be deliberate and intentional, is sufficient to violate the Constitution. Akins v. State of Texas, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276 * * *."

Fay v. *New York, supra,* at pp. 1533-1534.

It is respectfully submitted that the petitioners have not sustained the burden of establishing their claim that there was purposeful and intentional discrimination against negroes.

Section 13 of the Civil Rights Law of the State of New York provides as follows:

> "SECTION 13. Right to serve on juries. No citizen of the State possessing all other qualifications which are may be required or prescribed by law, shall be disqualified to serve as a grand or petit juror in any court of this State on account of race, creed, color, national origin, or sex, and any person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for any of the causes aforesaid shall, on conviction thereof, be

guilty of a misdemeanor and be fined not less than $100.00 nor more than Five Hundred Dollars or imprisoned not less than thirty days, nor more than ninety days, or both such fine and imprisonment."

Similarly, Congress on March , 1875 enacted, that

"'No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service by a grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude;' and made it a crime for any officer to exclude any citizen on those grounds. * * *."

Fay v. *New York, supra,* at page 1529.

In the light of the two foregoing statutes, it is highly improbable that a public officer charged with the duty of summoning and selecting jurors, having no motive, whatsoever, for discrimination against negroes, would make himself amenable to the foregoing statutes, by deliberately excluding members of that race from jury service.

As was said by Mr. Justice Jackson, in his opinion in *Fay* v. *New York, supra,* at page 1535:

"* * * The defendants have shown no intentional and purposeful exclusion of any class, and they have shown none that was prejudicial to them. They have had a fair trial, and no reason appears why they should escape its results."

CONCLUSION

The judgments under review should be affirmed.

Respectfully submitted,

SAMUEL J. FOLEY,
District Attorney of Bronx County,
State of New York,
Attorney for Respondent.

GEORGE TILZER,
Assistant District Attorney.

HERMAN J. FLIEDERBLUM,
of Counsel.

APPENDIX A

List of Cases Tried by General Juries Between July 1, 1937, and June 30, 1946, Resulting in Acquittals

Arson	2
Abduction	1
Abortion	4
Assault	40
Burglary—Stores	13
" —Dwelling	9
Criminally Receiving Stolen Property	5
Driving While Intoxicated (Misdemeanor)	2
Compulsory Prostitution	1
Extortion	4
Forgery	3
Grand Larceny—autos	16
" " —other cases	22
Incest	1
Indecent Exposure (Misdemeanor)	2
Malicious Injury to Property (Misdemeanor)	1
Maiming	1
Manslaughter	13
Rape (6 Rape, first degree); (4 Rape, 2nd degree, Statutory)	10
Robbery	20
Seduction	1
Sodomy	7
Section 483-A Penal Law (Carnal Abuse of a Child)	8
Section 1897 Penal Law (Carrying and Using Dangerous Weapons)	8
Section 1053-A (Criminal Negligence in the Operation of a Vehicle Resulting in a Death)	6
Section 986 Penal Law (Bookmaking) (Misdemeanor)	1
Section 100 Alcoholic Beverage Control Law (Misdemeanor)	2
Section 421 Penal Law (Untrue and Misleading Advertisements) (Misdemeanor)	2
Section 973 Penal Law (Keeping Gaming and Betting Establishments) (Misdemeanor)	1
Section 962 Penal Law ("Kick-back" of wages) (Misdemeanor)	1
Section 1826 Penal Law (Taking Unlawful Fees)	1
	208

APPENDIX B

Article I, Section 11 of the Constitution of the State of New York provides for the equal protection of the laws and no discrimination in civil rights.

Section 700 of the Penal Law of the State of New York makes it a misdemeanor to discriminate against any person in his civil rights on account of race, creed, color or national origin.

Section 13 of the Civil Rights Law provides that no person shall be disqualified as a juror on account of race, creed, color, national origin or sex; and provides that any person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any juror because of said causes shall be guilty of a misdemeanor.

Section 40 of the Civil Rights Law prohibits discrimination in places of public accommodation, resort or amusement because of race, creed or color etc.

Section 42 of the Civil Rights Law prohibits discrimination by utility companies because of race, creed, color or national origin.

Section 43 of the Civil Rights Law prohibits discrimination by labor organizations, because of race, creed, or color.

Chapter 118 of the Laws of 1945 of the State of New York, creates a State Commission Against Discrimination.

By Section J-41 1.2 of the Administrative Code of the City of New York, discrimination against any person, on account of race, color, or creed is prohibited, in tax exempt projects in the City of New York.

APPENDIX C

SEAL

THE POLICE COMMISSIONER.
CITY OF NEW YORK

January 28th, 1948.

Mr. George Tilzer
Assistant District Attorney
District Attorney's Office
Bronx County, New York.

Re: George Cornelius Moore and
Lester Haughton, Petitioners

against

The People of the State of
New York, Respondent.

Dear Mr. Tilzer:

With reference to your communication of January 27th, 1948, a re-survey has been conducted by this Department, which discloses that the negro population of Bronx County, City of New York, is now estimated to be between 65,000 and 70,000 persons.

As per attached copy of letter, I have advised Mr. Bernard Lander, Associate Director, Mayor's Committee on Unity, that the figure of 192,066 originally given him was not solely for negroes but included all persons in Bronx County not of the white race and that a re-survey, verified by general information from various sources including the Urban League of Greater New York, indicates that the negro population of Bronx County is now between 65,000 and 70,000 persons.

Sincerely yours,

/s/ ARTHUR W. WALLANDER,
Police Commissioner.

SEAL

THE POLICE COMMISSIONER
CITY OF NEW YORK

January 28th, 1948.

Mr. Bernard Lander
Associate Director
Mayor's Committee on Unity
Room 705, Municipal Building
Brooklyn, New York

Dear Sir:

On January 22nd, 1948, you were advised in a communication from this office that the estimated negro population of Bronx County, City of New York, was approximately 192,066. This information was sent you in accordance with your telephone request of January 12th, 1948, as Associate Director of the Mayor's Committee on Unity.

A re-survey has been made by the Department relative to the statistics quoted for Bronx County and it has been found that the figures given you under date of January 22nd, 1948, were not solely for the negro population but included all persons in Bronx County not of the white race. Statistics revealed by the new survey, as verified by general information obtained from various sources including the Urban League of Greater New York, indicates that the negro population of Bronx County is now between 65,000 and 70,000 persons.

The above information is forwarded you so that you may correct your records in this respect.

Very truly yours,

ARTHUR W. WALLANDER,
Police Commissioner.

s.

cc—Asst. District Attorney
George Tilzer
Bronx County

APPENDIX D

February 4, 1948

Mr. I. Saul Fleischman
160 Broadway
New York 7, N. Y.

Dear Mr. Fleischman:

I am enclosing a copy of a letter I received from the Police Commissioner on January 28, 1948, which revises our estimate of the Negro population of Bronx County which I sent to you on January 23, in response to your request for such information.

Sincerely yours,

Bernard Lander
Associate Director

BL/za
encl.

SUPREME COURT OF THE UNITED STATES

No. 485.—October Term, 1947.

George Cornelius Moore and Lester Haughton, Petitioners, v. The People of the State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.

[March 29, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

Petitioners were indicted in Bronx County, New York, on February 11, 1947, for the crime of murder in the first degree. The District Attorney moved the court for an order that the trial be by a special jury, pursuant to New York law, which motion was granted over opposition on behalf of defendants by assigned counsel. One hundred and fifty names were drawn from the special jury panel, under supervision of a Justice of the State Supreme Court, in the presence of defendants' counsel and without objection.

When the case was called for trial defendants, as permitted by the state practice, served a written challenge to the panel of jurors upon the following grounds:

1. That § 749–aa of the Judiciary Law of the State of New York is in violation of § 1 of the Fourteenth Amendment to the Constitution of the United States.

2. That qualified Negro jurors were improperly excluded from the list of special jurors, from which said jury panel was drawn.

3. That qualified women jurors were improperly excluded from the list of special jurors, from which said jury panel was drawn.

After full hearing, the challenge was disallowed and petitioners were tried and convicted. On appeal to the Court of Appeals, the third ground of challenge to the jury panel was abandoned and the convictions were affirmed. We granted certiorari on a petition raising the remaining grounds. 332 U. S. —.

The constitutionality of the New York special jury statutes has but recently been sustained by this Court, *Fay* v. *New York*, 332 U. S. 261, against a better supported challenge than is here presented, and the issue warrants little discussion at this time.

Some effort is made by statistics to differentiate this case from the precedent one as to the ratio of convictions before special juries contrasted with that before ordinary juries. The defendants present to us a study from July 1, 1937, to June 30, 1946, which indicates that special juries in Bronx County returned 15 convictions and 4 acquittals during the period and concludes that the special jury convicted in 79% of the cases while the general juries convicted in 57%. The District Attorney responds that in 5 of these 19 cases, the special jury returned conviction in a lesser degree than that charged and, hence in 9 out of 19 cases withheld all or part of what the State asked. Moreover, it is said that all but two were capital cases, another was for manslaughter and one for criminally receiving stolen property. It should be observed that the number of cases involved in these statements is too small to afford a secure basis for generalizing as to the convicting propensities of the two jury panels, even if the cases were comparable. But it appears that in Bronx County a system of special and intensive investigation is applied to capital cases from the moment they are reported, more careful preparation is given them and they are tried by the most experienced prosecutors. This makes this class of cases not fairly comparable with the run-of-the-mill cases, felony and misdemeanor, that are

included in the ordinary jury statistics. Moreover, none of these facts were laid before the trial court which was in the best position to analyze, supplement or interpret them. We think on this part of the challenge no question is presented that was not disposed of in *Fay* v. *New York, supra.* Indeed, on opening the hearing on defendants' challenge the trial court said, "I understand the inquiry now is to be directed to the intentional elimination or disqualification of women and Negroes on the special jury panel." Counsel for both defendants assented to this definition of the issues and no evidence on other subjects was offered.

Petitioners' remaining point is that "the trial of the petitioners, Negroes, by a jury selected from a panel from which Negroes were systematically, intentionally and deliberately excluded, denied petitioners the equal protection of law and due process of law guaranteed them by the Constitution of the United States." If the evidence supported the assumption of fact included in this statement, the point would be of compelling merit. The law on this subject is now so settled that we no longer find it necessary to write out expositions of the Constitution in this regard. See *Bronson et al.* v. *North Carolina,* 333 U. S.—, decided March 15, 1948.

It is admitted that on this panel of one hundred and fifty there were no Negroes. But not only is the record wanting in proof of intentional and systematic exclusion—the only witnesses sworn testified that there was no such practice or intent. Nothing in the background facts discredits this testimony. The census figures give a proportion of Negro-to-white population in that county of .7% in 1920, 1.0% in 1930, and 1.7% in 1940. It is admitted that since the last census the Negro population has considerably increased. According to one estimate, the number of colored inhabitants, which in 1940 was 24,892, has increased to 192,066 in 1948. The same estimator

later revised the figures to between 65,000 and 70,000. Neither estimate was before the trial court, and no evidence or finding gives us judicially approved data. Of course, new wartime arrivals take some time to qualify as active members of the community and its machinery of justice cannot be expected instantaneously to reflect their presence. The official who compiled the jury lists testified as to Negro jurors that "from 1946 on I must have examined at least 500 myself." The number accepted for service could not be ascertained from the records, which make no notation of color, but he testified that there were "maybe two dozen; maybe three dozen." For the special panel, he testified that he had examined an estimated one hundred Negroes and had accepted "maybe a dozen." The testimony is undenied.

The record is utterly devoid of proof of systematic, intentional and deliberate exclusion of Negroes from jury duty.

The judgment is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 485.—October Term, 1947.

George Cornelius Moore and Lester Haughton, Petitioners, *v.* The People of the State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.

[March 29, 1948.]

Mr. Justice Murphy, with whom Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Rutledge concur, dissenting.

This case represents a tragic consequence that can flow from the use of the "blue ribbon" jury. Two men must forfeit their lives after having been convicted of murder not by a jury of their peers, not by a jury chosen from a fair cross-section of the community, but by a jury drawn from a special group of individuals singled out in a manner inconsistent with the democratic ideals of the jury system. That group was chosen because they possessed some trait or characteristic which distinguished them from the general panel of jurors, some qualification which made them more desirable for the State's purpose of securing the conviction of the two petitioners. Such a basis for jury selection has no place in our constitutional way of life. It contravenes the most elementary notions of equal protection and I can no more acquiesce in its use in this case than I was able to do in *Fay* v. *New York*, 332 U. S. 261.

The constitutional invalidity of this "blue ribbon" system does not depend upon proof of the systematic and intentional exclusion of any economic, racial or social group. Nor does it rest upon a demonstration that "blue ribbon" juries are more inclined to convict than ordinary

juries. Such factors are frequently, if not invariably, present in "blue ribbon" situations, though proof is extremely difficult. But they are at best only the end products of the system, not the root evil.

The vice lies in the very concept of "blue ribbon" panels—the systematic and intentional exclusion of all but the "best" or the most learned or intelligent of the general jurors. Such panels are completely at war with the democratic theory of our jury system, a theory formulated out of the experience of generations. One is constitutionally entitled to be judged by a fair sampling of all one's neighbors who are qualified, not merely those with superior intelligence or learning. Jury panels are supposed to be representative of all qualified classes. Within those classes, of course, are persons with varying degrees of intelligence, wealth, education, ability and experience. But it is from that welter of qualified individuals, who meet specified minimum standards, that juries are to be chosen. Any method that permits only the "best" of these to be selected opens the way to grave abuses. The jury is then in danger of losing its democratic flavor and becoming the instrument of the select few.

Hence the "blue ribbon" method of selecting only the "best" of the general jurors, a method instituted with the highest of intentions, does violence to the fundamental precepts of the jury system. Appeals to administrative convenience do not soften that violence. And since the method deprives the defendant of the protection accorded others who are able to draw upon the general panel, it falls under the ban of the Fourteenth Amendment. I would therefore reverse the judgment below.